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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

JACK VAN HYNING,

Appellant,

v.

UNIVERSITY OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Can the highest court of a State avoid a holding of the United States Supreme Court recognizing procedural due process for college faculty in tenure proceedings by *sua sponte* requiring for standing that an unrepresented, six year employed, mandatory "tenure or out" faculty member have first appeared without meaningful notice before the body that determined him to be incompetent and which denied him the due process of law?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CASES AND AUTHORITIES ii
INTRODUCTION 2
OPINION BELOW 2
JURISDICTION 2
REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED 3
STATEMENT OF THE CASE 4
ARGUMENT 8
I. JACK VAN HYNING HAS BEEN DENIED THE DUE PROCESS OF LAW BY THE UNIVERSITY OF ALASKA; THE QUESTION PRESENTED IS SUBSTANTIAL 8
II. ANY APPLICATION OF THE EXAUSTION DOCTRINE FOR STANDING IS INAPPROPRIATE IN THIS CASE 12
CONCLUSION 14
APPENDIX:
I. OPINION OF THE SUPREME COURT OF THE STATE OF ALASKA 12
II. UNIVERSITY OF ALASKA FACULTY BULLETIN NO. 1970-71-5 ..... 5a
III. NOTICE OF APPEAL 15a
IV. STIPULATED STATEMENT OF FACTS OF THE PARTIES 18a

TABLE OF CASES AND AUTHORITIES

Cases: *Page*

Allied Stores of Ohio v. Stanley J. Bowers, 358 U.S. 522, (1959) 3
Board of Regents v. Roth, 408 U.S. 564 (1972) 8, 9, 10, 11, 12
Goldberg v. Kelly, 397 U.S. 254 (1970) 11
Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) 11, 12
Myers v. Bethelem Ship Building Corp., 303 U.S. 41, 50-51 (1938) 13
Perry v. Sindermann, 408 U.S. 593 (1972) 8, 10, 11
United States Constitution:
Fourteenth Amendment 3

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JURISDICTIONAL STATEMENT

INTRODUCTION

This is an appeal from the Opinion of the Alaska Supreme Court announced on January 26, 1981, Rehearing as denied on April 6, 1981, and Mandate as issued on April 7, 1981. The Alaska decision upheld the University of Alaska's secret denial of mandatory "tenure or out" to Assistant Professor Jack Van Hyning, Ph.D., thereby forever foreclosing future employment with the University of Alaska and, for all practical purposes, requiring him to move from the State if he is to follow his chosen career.

This Jurisdictional Statement is submitted to show that the United States Supreme Court has jurisdiction of the appeal and that a substantial question is presented meriting plenary consideration.

OPINION BELOW

The Opinion of the Supreme Court of the State of Alaska, not yet reported, appears in Appendix I.

JURISDICTION

The mandate of the Supreme Court of the State of Alaska was entered on April 7, 1981. Notice of appeal and this Jurisdictional Statement were filed within ninety (90) days of that date (Appendix III). This Court's jurisdiction is invoked under 28 USC 1257 (2). This Court should make an independent determination of standing to raise a federal constitutional issue:

> The first and preliminary question thus is whether the Supreme Court of Ohio correctly held that appellant lacked standing to prosecute the constitutional question sought to be presented. It is settled that
>
> "[w]hether a pleading sets up a sufficient right of action or defense, gounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense,

and is not concluded by the view taken of them by the state court." *First Nat. Bank v. Anderson*, 269 U.S. 341, 346, 70 L ed 295, 302, 46 S Ct 135; *Staub v. Baxley*, 355 U.S. 313, 318, 2 L ed 2d 302, 309, 78 S Ct 277.

Allied Stores of Ohio v. Stanley J. Bowers, 358 U.S. 522, 525 (1959).

REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED

University of Alaska Faculty Bulletin No. 1970-71-5 promulgated on 1/27/71, as set out fully in Appendix II, and which has the force of law, provides in pertinent part:

> Any member of the faculty who has not been offered tenure shall not be retained at the University of Alaska after six years of continuous full time service at the rank of Assistant Professor or above.
>
> * * *
>
> Tenure reviews will be rigorous, providing assurance that persons of doubtful qualifications will not be retained and that the University's needs are best met. In this way, the "tenure or out" policy will serve as an active force in the development and maintenance of excellence in faculty and programs.

The 14th Amendment of to the Constitution of the United States provides in pertinent part:

> §1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Marine biologist Dr. Jack Van Hyning was denied tenure status by the University of Alaska. The University's "tenure or out" process is mandatory. After six years of employment all faculty must submit to the process to assure "that persons of doubtful qualifications will not be retained" (Appendix II). A faculty member who is denied tenure can never again be employed at the University of Alaska. This is in addition to the stigma of being formally found in peer review to be a person of "doubtful qualifications."

Despite the enormous significance of the tenure decision at the University of Alaska the mandatory tenure candidate is admittedly denied the basic procedural due process which would ensure the decision to be at least a fair one. The candidate is not permitted to see the written evaluation statements of his or her colleagues. Candidates are not permitted to see any other materials concerning their qualifications that are before the Tenure Committee. Candidates are not permitted to be present when colleagues are testifying about their performance and qualifications. The candidate is not permitted to question those who testify. No rebuttal is possible. No record of the proceedings is maintained. No reasons for denial are given (Opinion, Appendix I and Stipulated Statement of Facts of the Parties, Appendix IV).

The Opinion of the Supreme Court of Alaska sets forth the following facts:

> Jack Van Hyning was hired by the University of Alaska in the capacity of Assistant Professor of Fisheries Biology in June of 1967 for a 12 month term. This contract was renewed in 1968, 1969, 1970, and 1971. The University's tenure policy, incorporated into Van Hyning's contract, provides that if tenure is not granted at the end of a probationary period, not to exceed six years, a terminal contract may be offered to the probationary employee. One who has been denied tenure is thereafter ineligible for full-time employment at the University.

Briefly, the tenure policy calls for a multi-tiered evaluation of a candidate's effectiveness in teaching, research, intra-faculty relationships, participation in professional societies and service to the University and the general public. The process begins with the recommendation of the head of each faculty department as to each untenured person who has completed four years of service, and proceeds through the hands of the appropriate dean, and vice president, finally reaching the university committee on tenure. This committee, composed of seven tenured faculty members elected by their peers, makes an independent evaluation of each tenure candidate. In addition to these written recommendations, the committee may request supplemental information from the applicant, his superiors, tenured colleagues or other persons. If the committee recommends to the president that tenure be denied, the applicant is entitled to notification of that decision. A person who is denied tenure during his fifth year of service may request reconsideration of his case by the president of the University.

In Van Hyning's case the committee recommended against granting tenure. He did not appear before the committee although he was entitled to. *The University stipulated that had Van Hyning requested to see the materials it considered in reaching its decision he would have been denied access. It stipulated further that had he so requested, he would have been denied the opportunity to question faculty members whom the committee interviewed in reaching its decision. No statment of reasons for recommending denial of tenure was provided.* Van Hyning did not request the president to grant reconsideration of his case.

When the university president informed Van Hyning in April of 1972 of the tenure committee's decision, Van Hyning accepted a terminal contract and resigned effective June 30, 1973. On May 27, 1976, he sued the University alleging violations of procedural due process in denying him tenure. The University's motion to dismiss under Alaska Rule of Civil Procedure 12(b)(6) was granted. The

> superior court found the action lay in tort and not in contract, and was thus barred by the two year statute of limitations. ***Additionally, on the merits the court decided that no liberty or property interest was implicated by the denial of tenure and that plaintiff was not entitled to a due process hearing on the question of tenure.*** This appeal followed (emphasis supplied, footnotes omitted, Appendix I).

The Alaska Court did not address any of the issues raised before the trial court which by agreement were:

(1) Was the University of Alaska required to provide Jack Van Hyning with a due process hearing concerning its refusal to grant him tenure either before or after that decision was reached.

(2) If plaintiff has stated a cause of action, is that cause of action barred by the Statute of Limitations.

(3) If plaintiff prevails on his claim on the merits, is he entitled to damages in the nature of back wages only if he is granted tenure after a due process hearing (Stipulation, Appendix IV).

Instead, it found *sua sponte* that Van Hyning had failed to adequately exhaust the very process he complained of:

> Here Van Hyning did not appear before the tenure committee and did not take his case to the president after the tenure committee had made its unfavorable recommendation. These failures deprived the University of the opportunity to take further action on his case which could have inlcuded a decision affording him tenure. Van Hyning argues that pursuing his remedy administratively any further than he did would necessarily have been futile, but this argument is unsupported in the record, and is essentially incapable of being verified since the effort was not in fact made.

Van Hyning argues before this Court on Appeal that it would have been *a fortiori* futile for him appear at any proceeding where he would not have been aware of any of the

now apparent negative allegations against him, much less have been able to present any meaningful response.

At any such "appearance" Van Hyning would have been denied access to *any* materials and information being considered by the committee and would have been unknowing of and unable to address any allegations or question any of the faculty members the committee interviewed. The Alaska Court has held that because Jack Van Hyning chose not to appear before an inquisitorial tribunal at which he would have no right to fair hearing and treatment, he failed to exhaust his administrative remedies. If procedural due process has any purpose, such an appearance would have been meaninglessly futile. The Alaska decision functionally sustains the validity of the tenure process by erroneously failing to rule on its validity.

So too with any purported resort to the University President. Indeed, it was the President who actually denied tenure upon the Tenure Committee's recommendation. It was stipulated below by the parties that:

> In April of 1972 plaintiff was informed that he was denied tenure by the President of the University of Alaska, William R. Wood, upon the recommendation of the Tenure Committee (Stipulation, Appendix IV).

The Alaska Court further ignored the parties' stipulation that Jack Van Hyning was advised to resign by an agent of the University and did in fact resign in order to minimize the professional impact of the denial of tenure. By this action Van Hyning was precluded from pursuing any administrative remedy (Paragraph VI, Stipulation, Appendix IV).[1]

Jack Van Hyning's complaint is with the lack of due process afforded him by the Tenure Committee and the University President. This tenure policy was adopted by the Board of Regents of the University of Alaska. By structural definition it

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[1]Van Hyning was not represented by counsel prior to the initiation of this litigation.

would have been futile for Jack Van Hyning to ask either the President of the University of Alaska or the Tenure Committee to change procedures adopted by the Board of Regents. There is no appeal to the Board of Regents.

The Alaska Court has chosen to ignore these factual realities within the record in avoidance of this Court's holding in *Board of Regents v. Roth*, infra. Jack Van Hyning is now forever foreclosed from teaching at the University of Alaska because of the Alaska Court's finding that he should have appeared at a proceeding in which he would have admittedly been denied due process and proceeded therefrom to a person who admittedly had no power to change the rules complained of and who had already denied him tenure.

ARGUMENT

I. JACK VAN HYNING HAS BEEN DENIED THE DUE PROCESS OF LAW BY THE UNIVERSITY OF ALASKA: THE QUESTION PRESENTED IS SUBSTANTIAL

There are two seminal United States Supreme Court cases addressing the issue of tenure in higher education: *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972).

Roth was hired by Wisconsin State University for his first teaching job as Assistant Professor for a fixed term of one academic year. He completed that year but was informed that he would not be rehired. The University refused to give him any sort of a due process hearing. This Court held that the requirements of procedural due process applied to deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. The Court found that Roth was not deprived of any property interests inasmuch as his contract was for only one year; the mere hiring for one year did not give rise to any procedural rights. Jack Van Hyning, however, was not simply "hired for one year" but had his contract renewed for six years with the full expectation of continued employment absent a finding during the mandatory tenure process that he was a person of doubtful qualifications.

The Tenure Committee did not decide "simply not to renew" Jack Van Hyning's contract as was the case with Roth, but rather made an affirmative finding that Van Hyning lacked competence in his field to the degree that he could never again teach at the University. The *Roth* Court stated in language which is directly applicable here:

> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. *The State, for example, did not involve any regulations to bar the respondent from all other public employment in State universities. If it had done so, this again would be a different case. For 'to be deprived not only of present government employment but of future opportunity for it is no small injury' (Citations omitted.)* The Court has held, for example, that a state, in regulating the eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravenes due process'. (Citation omitted) And, specifically, in a manner that denies the right to full prior hearing (Citation omitted) *Ibid.* 408 U.S. 573-574; (emphasis supplied).

This is that different case. Jack Van Hyning is in fact forever barred from other employment in his profession at the University of Alaska and, practically speaking, anywhere else in Alaska. The Alaska tenure process is not elective, it is mandatory. In *Roth*, the Court found that the terms of respondent's appointment secured no interest in re-employment the next year. Jack Van Hyning, however, had an expectation of continued employment absent an affirmative finding that he was "doubtfully qualified". He was, in fact, re-employed for six continuing and successive years. The method by which Jack Van Hyning was not re-employed was by an affirmative denial of tenure, not a passive non-renewal of his contact.

Speaking of Fourteenth Amendment liberty interests in *Roth*, this Court stated:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to

> engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of their conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. 408 U.S. at 572.
>
> * * *
>
> The state, in declining to rehire the respondent did not make any charge against him that might seriously damage his standing and association in his community. It did not base the nonrenewal of his contact on a charge, for example, that he had been guilty of dishonesty or immorality. Had it done so, this would be a different case. For 'where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential.' (Citations omitted). *In such a case, due process would accord an opportunity to refute the charge before university officials.* In the present case, however, there is no suggestion whatever that the respondent's interest in his 'good name, reputation, honor or integrity' is at stake. 408 U.S. at 573 (emphasis supplied).

Sindermann examines in more depth the concept of Fourteenth Amendment property. The Court held that a teacher employed for a number of years in the same institution should be permitted to show that he or she did have an expectation of continued employment. Speaking of *Roth*, the Court noted:

> We have held today in *Board of Regents v. Roth*, (Citation omitted) that the Constitution does not require opportunity for hearing before the non-renewal of a non-tenured teacher's contract *unless he can show the decision not to rehire him somehow deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment*, despite the lack of tenure or a formal contract. In *Roth*, the teacher had not made a showing on either point to justify a summary judgment in his favor. 408 U.S. at 599 (emphasis supplied).

Jack Van Hyning had an understanding and property interest as articulated in the Tenure Bulletin (Appendix II) that he would continue at the University unless he was found to be "doubtfully qualified". He is no longer at liberty to ever again be hired by the University of Alaska.

The Court noted in *Sindermann:*

> We have made clear in *Roth* (Citation omitted) that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid,* 408 U.S. 601.

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), welfare recipients challenged the termination of their benefits without pretermination notice of a hearing. The significance of *Goldberg* here is the *Roth* Court's characterization of that case. The welfare recipients in Goldberg, said the Court, "had a claim of entitlement to welfare benefits that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so." *Roth,* 408 U.S. at 577.

In the case at bar, Jack Van Hyning's relationship with the University was terminated on the ground that he did not meet the University's standards. As the recipient in *Goldberg,* he claims that he was eligible for tenure under regulations which establish those standards, and seeks a fair hearing at which he can attempt to demonstrate his entitlement under the regulations.

In *Goldsmith* v. *Board of Tax Appeals,* 270 U.S. 117 (1926), a certified public accountant was denied the right to practice before the Board of Tax Appeals on the ground that he was unfit. While the *Goldsmith* Court decided the case on grounds

other than procedural due process, the *Roth* Court took note of the dicta concerning notice and fair hearing, stating that *Goldsmith* was entitled to those procedural rights because "the existence of the Board's eligibility rules gave petitioner an interest and claim to practice before the Board to which procedural due process requirements applied." 408 U.S. at 576, n. 15.

Like the certified public accountant in *Goldsmith*, Jack Van Hyning falls within the class of persons eligible to be considered for tenure; indeed, his participation in the process was required as a condition of employment. As in *Goldsmith*, the government agency determined, without hearing, that he did not meet its standards of fitness for tenure.

II. ANY APPLICATION OF THE EXHAUSTION DOCTRINE FOR STANDING IS INAPPROPRIATE IN THIS CASE

The Alaska Supreme Court stated that:

> Here Van Hyning did not appear before the tenure committee and did not take his case to the president after the tenure committee had made its unfavorable recommendation (Appendix I).

Any appearance before the tenure committee would have been *a fortiori* meaningless. Van Hyning would have known none of the contents of the proceedings. He would not have known or have had access to the written and oral testimony of his colleagues. He could not have answered any accusations or rebutted any innuendo. From any perspective such an inquisitorial appearance would have been meaningless, futile and humiliating.

There was also no way that Van Hyning could "take his case to the president" as suggested by the Alaska Court. It was in fact the president who exparte denied him tenure based upon the Tenure Committee's recommendation. Perhaps the Alaska Court meant Van Hyning should have asked for reconsideration; but the parties stipulated below that Van Hyning resigned as the direct and proximate result of being denied tenure in an effort to reduce professional impact (Appendix

IV). Van Hyning could not resign, appeal, and ask for reconsideration simultaneously.

In *Myers* v. *Bethelem Ship Building Corp.*, 303 U.S. 41, 50-51 (1938), it was recognized that a basic principle of administrative law is that "no one is entitled to judicial relief for a supposed or threatened injury until the *proscribed* administrative remedy has been exhausted (emphasis supplied)." The mandatory tenure candidate has absolutely no proscribed administrative remedy in either appeals, pleas to the President of the University who has already made his decision, or to any grievance committee. It is axiomatic that the agency to whom administrative remedies are addressed must have sufficient authority to accord the relief sought. The purported administrative procedures suggested by the Alaska Court are accordingly inappropriate and would have proven unavailing inasmuch as the procedural actions complained of were those specifically approved by the Board of Regents. Neither the tenure committee nor the President had the power to alter the secrecy of the tenure process and made their decisions accordingly.

CONCLUSION

Jack Van Hyning's teaching career has been irrevocably terminated for reasons unknown and through a process that is unfair. To this day Van Hyning does not know the actual basis for this decision nor has he been given any opportunity to rebut his accusers. The Alaska Supreme Court has compounded this injury by holding that Van Hyning did not adequately participate in the very offending process.

The question presented is of substantial Constitutional magnitude so as to merit plenary treatment by the Court.

If this matter is not properly raised on appeal then it is requested that this Jurisdictional Statement be treated as a Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 6th day of July, 1981.

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APPENDIX

APPENDIX I

THE SUPREME COURT OF THE STATE OF ALASKA

JACK VAN HYNING,	)	
	)	
Appellant.	)	
	)	File No. 4022
v.	)	
	)	OPINION
UNIVERSITY OF ALASKA,	)	
	)	
Appellee.	)	
	)	[No. 2267 - January 16, 1981]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage,
Mark C. Rowland, Judge.

Appearances: Robert H. Wagstaff, Wagstaff & Middleton, Anchorage, for Appellant. Sanford M. Gibbs, Hagans, Smith, Brown, Erwin & Gibbs, Anchorage, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Boochever, Burke and Matthews, Justices.*

MATTHEWS, Justice.

Jack Van Hyning was hired by the University of Alaska in the capacity of Assistant Professor of Fisheries Biology in June of 1967 for a 12 month term. This contract was renewed in 1968, 1969, 1970, and 1971. The University's tenure policy, incorporated into Van H[illegible]ng's contract, provides that if tenure is not granted at the end of a probationary period, not to exceed six years, a terminal contract may be offered to the

*This case was submitted to the court for decision prior to Justice Boochever's resignation.

probationary employee. One who has been denied tenure is thereafter ineligible for full-time employment at the University.

Briefly, the tenure policy calls for a multi-tiered evaluation of a candidate's effectiveness in teaching, research, intra-faculty relationships, participation in professional societies and service to the University and the general public. The process begins with the recommendation of the head of each faculty department as to each untenured person who has completed four years of service, and proceeds through the hands of the appropriate dean and vice president, finally reaching the university committee on tenure. This committee, composed of seven tenured faculty members elected by their peers, makes an independent evaluation of each tenure candidate. In addition to these written recommendations, the committee may request supplemental information from the applicant, his superiors, tenured colleagues or other persons. If the committee recommends to the president that tenure be denied, the applicant is entitled to notification of that decision. A person who is denied tenure during his fifth year of service may request reconsideration of his case by the president of the University.

In Van Hyning's case the committee recommended against granting tenure. He did not appear before the committee although he was entitled to.[1] The University stipulated that had Van Hyning requested to see the materials it considered in reaching its decision he would have been denied access. It stipulated further that had he so requested, he would have been denied the opportunity to question faculty members whom the committee interviewed in reaching its decision. No statement of reasons for recommending denial of tenure was provided. Van Hyning did not request the president to grant reconsideration of his case.

When the university president informed Van Hyning in April of 1972 of the tenure committee's decision, Van Hyning accepted a terminal contract and resigned effective June 30,

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[1]Although we can find no such provision in the tenure policy, the parties stipulated that Van Hyning would have been entitled to appear before the tenure committee had he desired to do so.

1973. On May 27, 1976, he sued the University alleging violations of procedural due process in denying him tenure. The University's motion to dismiss under Alaska Rule of Civil Procedure 12 (b) (6)[2] was granted. The superior court found that the action lay in tort and not in contract, and was thus barred by the two year statute of limitations. Additionally, on the merits the court decided that no liberty or property interest was implicated by the denial of tenure and that plaintiff was not entitled to a due process hearing on the question of tenure. This appeal followed.

We conclude that the judgment should be affirmed because of Van Hyning's failure to exhaust his administrative remedies. "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37, 31 L.Ed.2d 17, 25 (1972). *See generally* 3 K. Davis, Administrative Law Treatise §§ 20.01-.10 (Supp. 1970). Here Van Hyning did not appear before the tenure committee and did not take his case to the president after the tenure committee had made its unfavorable recommendation. These failures deprived the University of the opportunity to take further action on his case which could have included a decision affording him tenure. Van Hyning argues that pursuing his remedy administratively any further than he did would necessarily have been futile, but this argument is unsupported in the record, and is essentially incapable of being verified since the effort was not in fact made.

If Van Hyning had promptly challenged the tenure committee's decision in court without first exhausting his administrative remedies, the court, in its discretion, might properly have required him to exhaust those remedies while retaining jurisdiction in the event that doing so did not bring

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[2]The University's motion was treated as a motion for summary judgment under Alaska R. Civ. P. 56.

him acceptable relief.[3] However, when the court made its ruling such discretionary relief had become, in all probability, impractical[4] due to Van Hyning's four year delay in filing suit, because of intervening commitments made by the University and changes in personnel among the decision makers.

The judgment is AFFIRMED.

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[3]*See* Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978).

[4]In Jerrell v. Kenai Peninsula Borough School District, 567 P.2d 760, 767 (Alaska 1977), we recognized the "practical concerns" of an educational institution relating to its ability "to effectively plan future hiring." "Prompt decisions on whether a teacher is to be retained are of considerable importance in determining the personnel to be hired for the ensuing school years."

APPENDIX II

UNIVERSITY OF ALASKA

FACULTY BULLETIN

No. 1970-71-5
January 27, 1971

Following review of the recommendation from the University Assembly concerning modification of the University Tenure Policy, the Board of Regents took action at their May and October 1970 meetings. The entire modified Tenure Policy is set forth herewith.

PROCEDURES FOR GRANTING TENURE

The primary function of a university is to provide for continual critical examination of the tenets of truth and for the preservation and extension of these tenets. To accomplish this function, the University must assemble a community of faculty and students, and must provide for them an environment that encourages free and honest inquiry, free expression of ideas, and the development of critical capacities. The primary purpose of a tenure policy is to assure the academic community of such an environment, one that will nurture the pursuit of knowledge, wisdom, and ultimately truth. Such a policy gives the faculty member freedom to teach and study, but it does not release him of his responsibility to maintain high standards of professional integrity and to contribute his maximum to the academic community.

I. UNIVERSITY COMMITTEE ON TENURE

A University Committee on Tenure will consider and advise the President on matters relating to tenure. This Committee shall be composed of seven tenured members of the faculty, chosen for their wisdom and maturity in professional matters. All committee members shall be of the rank of Associate Professor or above; their university duties shall be primarily in

teaching, research, public service, or professional-level service activity. They shall have had at least twelve years of academic experience, preferably at two or more institutions. Committee members shall be chosen for their professional maturity, rather than their affiliation with a particular discipline or administrative unit. They shall be elected for a term of three years by the University Assembly from a slate of candidates presented by a nominating committee selected from among eligible professional personnel of the University Assembly. The slate shall include at least two candidates for each vacancy on the Tenure Committee. Not more than two candidates shall be from the same college, institute, or other major administrative unit of the University. The Committee will elect its own chairman annually.

II. CONDITIONS FOR THE GRANTING OF TENURE

A. To be eligible for consideration for tenure, a person

1. must hold a full-time professional appointment, controlled by the University, and

2. must hold the rank of Assistant Professor or above (or its equivalent in research or service title), and

3. must hold a professional title apart from any administrative assignment, since eligibility for tenure does not extend to administrative positions.

B. Any member of the faculty who has not been offered tenure shall not be retained at the University of Alaska after six years of continuous, full-time service at the rank of Assistant Professor (or equivalent) or above. This provision does not apply to professional staff members whose duties are essentially administrative (less than 50% teaching, research, or public service) or to professional staff members who have attained academic rank other than through regular, systematic review procedures. Tenure in academic rank may be granted to administrative personnel when their qualifications for this assignment are established through regular channels. Tenure reviews will be rigorous, providing assurance that persons of doubtful qualifications will not be retained and that the University's needs are best met. In this way, the "tenure or out" policy will serve as an active force in the development and maintenance of excellence in faculty and programs.

Six years above the rank of Instructor (or equivalent) is a maximum probationary period; tenure may be offered by the President upon appropriate review after a 0-5 year period at the University. However, a person who has served a term of probationary service of more than three years in one or more institutions of higher learning should not be required to serve a probationary period of more than four years. The terms and conditions of every appointment to the faculty will be stated or confirmed in writing, and a copy of the appointment document will be supplied to the faculty member. Any subsequent extensions or modifications of an appointment, and any special understanding, or any notices incumbent upon either party to provide, will be stated or confirmed in writing and a copy will be given to the faculty member.

C. If tenure is offered but declined by a person, the terms of the tenure policy shall be deemed to have been fulfilled and the person may be retained.

D. Associate and Full Professors (or equivalent) who have received an unconditional seventh (or more) continuous contract by 1 July 1966 automatically will be deemed to have been offered tenure as of that date.

E. A faculty member shall be judged on the basis of his total potential contribution to the University when he is being reviewed for tenure. The following criteria will be considered, giving cognizance to the candidate's university assignment:

1. Effectiveness of Teaching: Scholarly level exhibited, creative preparation and presentation of materials, commitment to high academic standards, awareness of students' concerns, and the ability to stimulate and guide them to a high level of achievement; interest in developing methods for imparting the subject matter to the student; participation in curriculum development; recognition of the student as an individual; and effectiveness at individual counseling.

2. Effectiveness of Research: Scholarly level exhibited, commitment to high academic standards, original approach to problems, quality of published and unpublished contributions to knowledge, professional growth as reflected by publications and other creative work, recognition by his peers.

3. Effectiveness in professional-level service extending or supporting teaching or research. Demonstrated competence as an informal instructor or disseminator of information in special field; ability in motivating people to analyze and solve their own problems; appropriate academic background and evidence of continued professional growth; competence in working successfully with others on an individual basis; evidence of insight into community and state problems related to areas of University responsibility; recognition and respect for creative productivity and participation in significant activities of special professional field.

4. Other Criteria.

a. Personal relationships as a member of the faculty: Professional ethics and principles, judgment and tact, cooperativeness, resourcefulness, and responsibility.

b. Participation in professional societies of state or national scope; offices held, committee activities, addresses made.

c. University and public services: Committee work, administrative assignments, sponsoring of student organizations and projects; importance of service to the University, community, and the State.

III. PROCEDURES FOR THE GRANTING OF TENURE

A. The usual procedure for the initiation and processing of an application for tenure will be as follows:

1. Annually not later than 1 October each department head (or other appropriate administrative person) shall prepare a list of names of untenured persons in his department, or other administrative unit, who have completed their fourth year of eligible service. A copy of this list shall be forwarded to his dean or director and a copy to the cognizant vice president.

2. The department head will prepare, or cause to be prepared, a dossier setting forth the qualifications of each

such eligible person whom he intends to recommend (see Section II, "Conditions for the Granting of Tenure," for criteria). After consulting with senior members of his department as appropriate, he will forward this dossier, together with his recommendation and justification, to the appropriate dean or institute director no later than 15 November.

If the department head does not intend to recommend for tenure an eligible faculty member beginning his fifth year of continuous service, he shall prepare, no later than 15 October, a conditional memorandum to that effect, stating his reasons, and deliver the same through review counsel to the President.

3. The dean or institute director will add his recommendations and justifications to the dossier and forward the same to the appropriate vice president no later than 30 November.

4. The vice president will add his recommendations and justifications and forward the entire dossier to the President no later than 31 December.

5. The President will then seek from the University Committee on Tenure an independent evaluation on each candidate under consideration. He will provide the Committee with essential personnel records for review purposes.

6. The Committee will return the personnel records, together with its recommendations and justifications, to the President of the University no later than 1 February. If the Committee is not unanimously agreed on a recommendation, the vote, together with the reasons for the split vote, shall be included in the advisory recommendation.

7. As expeditiously as possible, the person concerned will be notified by the President of the decision on his case. However, notification will not be delayed beyond the date when new contracts are issued (normally about 30 March). The President will also notify both the vice presidents and the chairman of the Committee of his decision on each application; if the decision is contrary to the recommendations of the majority of the committee, he will state the reasons for his decisions.

8. At any stage in this procedure, the administrative officer or the Committee considering the application may request additional information from the person concerned, his administrative superiors, his tenured colleagues at the University of Alaska, or other qualified persons. However, such a request must not be allowed to delay the forwarding of the dossier according to the schedule outlined above.

B. Tenure applications may also be initiated by the individual concerned, the tenured faculty of the department, any administrator to whom the person is responsible, or the University Committee on Tenure. Such applications shall be forwarded through the normal channels as outlined in III A.

C. Under unusual circumstances, tenure applications may be initiated at times other than those indicated above. However, under such circumstances, the procedure outlined above will be followed, with appropriate changes in scheduled dates.

D. Tenure applications which have not been approved are subject to review without prejudice until the end of the fifth year of service.

A person who has been reviewed and not offered tenure during his fifth year of continuous service may request of the President reconsideration of his case.

IV. CONDITIONS FOR THE TERMINATION OF TENURE

A. Tenure will be terminated on 1 July following a faculty member's sixty-fifth (65) birthday. A faculty member over sixty-five (65) may continue to serve on an annual basis without tenure subject to approval by the President of the University.

B. A tenured faculty member may be terminated in case of prolonged medical disability, or financial exigency that prevents payment of salary. Should funds for the position vacated become available within two contract years following such termination for financial exigency the tenured faculty

member shall be invited to return. Should he decide not to accept the offer, he will immediately notify the University so that a suitable replacement may be made.

C. Except on the above grounds, termination of tenure shall be considered only in cases of dismissal for adequate cause.

A faculty member is to be considered for granting of tenure and dismissal for adequate cause in view of his professional integrity as a representative of his special field of qualification, of his profession, and of the University. The definition of adequate cause for dismissal cannot be made precise. The general areas of concern that obviously may generate charges sufficient for dismissal are unprofessional actions, unethical or immoral conduct, or professional incompetence. It is the responsibility of the University to dismiss for cause any member of its faculty who has lost his overall effectiveness in his University assignment as set forth in Section E of "Conditions for the Granting of Tenure."

V. PROCEDURES FOR THE DISMISSAL OF A TENURED FACULTY MEMBER FOR ADEQUATE CAUSE

A. The procedure to be followed in the event of dismissal of a tenured member for adequate cause shall be as follows:

1. Preliminary Proceedings: When the fitness of a faculty member is under question, the appropriate administrative officer shall ordinarily discuss the matter with him directly. If a mutually satisfactory adjustment of the matter does not result, the matter shall be referred to the University Committee on Tenure, augmented for this purpose by two administrative officers who are not immediately concerned with the case and who shall be appointed by the President. This augmented Committee shall make an informal inquiry, assist in arriving at an agreement if possible and, if none is effected, advise the appropriate administrative officer whether proceedings should be instituted toward a dismissal. If the appropriate administrative officer decides, either with or without the concurrence of the Committee, to begin proceedings, then he shall

formulate a statement setting forth the grounds proposed for dismissal, such statement to be presented to the augmented University Committee on Tenure.

2. Initiation of Formal Proceedings: The statement of the administrative officer shall then be incorporated in a letter from the president to the faculty member informing him that an inquiry to determine whether he should be removed from his faculty position on the grounds stated will be conducted by the augmented University Committee on Tenure, meeting at a specified time and place, sufficient time being allowed for the preparation of his defense, such period not to be less than 15 days. The faculty member shall be informed in detail of the procedural rights that will be accorded him, such as his right to counsel and the right to be informed completely of the evidence on which the grounds proposed for dismissal are based. In particular, the procedures specified in Section V.A. 4 below shall be made known to him. The faculty member shall reply to the President in writing whether he wishes a hearing at which he will be present and, if so, shall answer in writing, not less than one week before the date set for the hearing, the administrative officer's statement.

3. Suspension of the Faculty Member: Suspension of a faculty member during the proceedings against him may not be imposed unless it is necessary to avoid harm to individuals. Such suspension shall be with pay.

4. Proceedings of the augmented University Committee on Tenure: Committee considerations shall commence within 30 days after formal proceedings are initiated.

The Committee shall proceed by considering the statement of grounds for dismissal already formulated in the administrative recommendation for dismissal, said statement to be presented to the Committee together with the faculty member's response. If the faculty member has not requested a hearing, the Committee shall consider the case on the basis of available information and decide whether or not a hearing shall be held. Hearings shall be private unless the faculty member requests otherwise and the Committee concurs in the request. If any facts are in dispute, the testimony of witnesses

and other evidence concerning the charges shall be received. The administrative officer initiating the dismissal proceedings or his representative shall present the evidence for dismissal. The Committee shall determine the order of proof, normally conduct the questioning of witnesses, and, if necessary, assure the presentation of evidence.

The faculty member shall have the option of assistance by counsel. The faculty member shall have the aid of the Committee and of the President in securing the attendance of witnesses. The faculty member or his counsel and the administrative officer initiating the proceedings or his representative shall have the right, within reasonable limits, to question all witnesses who testify orally. The faculty member shall have the opportunity to be confronted by all witnesses adverse to him. If, in the judgment of the Committee, very unusual circumstances make this impossible, the identity of the witness, and his statements, shall be made known to the faculty member. Subject to these safeguards, statements may when necessary be taken outside the hearing and reported to it. All of the evidence shall be duly recorded. The record of the hearing shall be available to the faculty member. If a charge of incompetence is involved, testimony shall include that of teachers and other scholars in his discipline.

On the basis of the hearing the Committee shall reach its decision in conference, giving opportunity to the faculty member or his counsel and the administrative officer initiating the proceedings or his representative to summarize orally before it, and to submit written briefs if the Committee desires. The Committee shall then arrive at explicit findings with respect to each of the grounds for dismissal presented, and formulate its decision for or against removal of the faculty member. The President and the faculty member shall be notified in writing of the Committee's decision no later than 10 days after the close of the hearings. Each shall receive, as promptly as possible, and at the same time, a copy of the record of the hearing.

5. Decision by the President: A decision shall be rendered by the President no later than 15 days after notification by the Committee of their recommendation.

B. Public statements about the case by either the faculty member or administrative officers shall be avoided until the proceedings have been completed, except for such simple announcements as may be required concerning the time of the hearing and similar matters. Any release to the public shall be made through the President's Office.

VI. TERMINATION OF A NON-TENURED FACULTY MEMBER

Notice of non-reappointment, or of intention not to recommend reappointment shall be given in writing in accordance with the following procedures:

1. Not later than 1 March of the first academic year of service, if the appointment expires at the end of that year, or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

2. Not later than 15 December of the second academic year of service if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

3. At least twelve months before the expiration of an appointment after two or more years at the University.

VII. NOTICE BY FACULTY MEMBER OF INTENT TO LEAVE

A faculty member should give six months' notice of his intent to leave the University.

This memorandum supersedes those of the same subject dated March 4, 1966 and December 6, 1968.

/s/_____
William R. Wood
President

APPENDIX III

IN THE SUPREME COURT OF THE STATE OF ALASKA

JACK VAN HYNING,	)
	)
Appellant,	)
	)
v.	)
	)
UNIVERSITY OF ALASKA,	)
	)
Appellee.	)
	)

Supreme Court No. 4022

NOTICE OF APPEAL

COMES NOW Robert H. Wagstaff, counsel for Appellant and gives Notice of Appeal to the Supreme Court of the United States from this Court's Opinion of January 26, 1981, denial of rehearing of April 6, 1981, and subsequent Mandate dated April 7, 1981. This appeal is taken pursuant to 28 USC 1257 (2).

DATED at Anchorage, Alaska this 22nd day of June, 1981.

WAGSTAFF, MIDDLETON & POPE

By: s/
Robert H. Wagstaff

IN THE SUPREME COURT OF THE STATE OF ALASKA

JACK VAN HYNING,	)
	)
Appellant,	)
	)
v.	)
	)
UNIVERSITY OF ALASKA,	)
	)
Appellee.	)
	)

Supreme Court No. 4022

AFFIDAVIT OF MAILING

STATE OF ALASKA	)
	) ss.
THIRD JUDICIAL DISTRICT	)

ROBERT H. WAGSTAFF, of the law firm of WAGSTAFF, MIDDLETON & POPE, 912 W. Sixth Avenue, Anchorage, Alaska 99501, being first duly sworn deposes and says that on the 22nd day of June, 1981 he served a copy of the NOTICE OF APPEAL on:

Floyd Smith, Esq.
1345 W. 9th, Suite 201
Anchorage, Alaska 99501

Wilson L. Condon
Attorney General
420 L Street, Suite 100
Anchorage, Alaska 99501

by depositing said copies in the U.S. Mail, postage prepaid.

To counsel's knowledge these are all the persons who need to be served.

FURTHER affiant sayeth naught.

s/
Robert H. Wagstaff

SUBSCRIBED AND SWORN to before me this 22nd day of June, 1981.

s/
Notary Public in and for Alaska
My Commission Expires: 3-24-82

APPENDIX IV

IN THE SUPERIOR COURT OF THE STATE OF ALASKA

JACK VAN HYNING,	)	
	)	
Plaintiff.	)	
	)	
v.	)	
	)	
UNIVERSITY OF ALASKA,	)	
	)	
Defendant.	)	
	)	NO. 76-4288A

STIPULATED STATEMENT OF FACTS OF THE PARTIES

COME NOW the parties to this action and hereby stipulate and agree as follows:

1. Plaintiff, Jack Van Hyning was hired by the University of Alaska in June, 1967. At that time plaintiff was hired on a twelve month contract which was renewed for the following academic years of 1968, 1969, 1970 and 1971. During the period of time that he was employed at the University of Alaska, the plaintiff worked as an Associate Professor of Fisheries Biology. In April of 1972, plaintiff was informed that he would not receive tenure at the University of Alaska. Pursuant to the policies of the University of Alaska plaintiff was given a terminal contract for the following academic year. Plaintiff resigned from the University of Alaska effective June 30, 1973, upon the recommendation of his Dean, but this was not an official recommendation of the University of Alaska but was entirely personal. At all times while plaintiff was employed at the University a formal tenure system was in effect. This system provided that if tenure was not granted at the end of a designated period that a terminal contract would

be provided and that thereafter the unsuccessful applicant would not be eligible for further full-time employment at the University. When plaintiff's tenure review was held the tenure committee recommended against granting tenure and the President at the University accepted the recommendation. Plaintiff did not appear in front of the tenure committee although he had the right to do so. The tenure committee reviewed written materials provided it and interviewed other faculty members familiar with plaintiff's work. Had plaintiff sought access to these materials or requested to be present during the interviews, his requests would have been denied. Had the plaintiff sought to "cross-examine" faculty members appearing before the committee that right would not have been granted since the tenure committee does not feel it is an "adversary proceeding." No statement of specific reasons for the denial of tenure was given.

Following his being informed that he would be denied tenure plaintiff did not appeal the decision of the University. Plaintiff did not seek within the University of Alaska, any review of the decision concerning tenure with the exception that plaintiff requested further information from his Dean.

The Parties further stipulate and agree that the following paragraphs, as modified, of plaintiff's complaint are true:

I.

Plaintiff is an experienced, professional biologist with a doctorate degree in fisheries biology obtained in 1968 from Oregon State University. Prior to the events herein described he enjoyed a good reputation in his field.

II.

On or about June 13, 1967, plaintiff was hired by defendant on a twelve month contract to be Associate Professor of Fisheries Biology at the University of Alaska in Fairbanks.

III.

The contract was renewed for the succeeding academic years 1968, 1969, 1970 and 1971.

IV.

Under the terms of the University of Alaska Faculty Bulletin No. 1970-71-5 dated January 27, 1971, any member of the University of Alaska faculty who had not been offered tenure shall not be retained at the University of Alaska after six years of continuous fulltime service at the rank of assistant professor or above. The policy explicitly provides that tenure reviews will be rigorous providing assurance that persons of doubtful qualifications will not be retained and that the University's needs are best met. The Tenure Committee is to make appropriate recommendations to the President of the University.

V.

In April of 1972 plaintiff was informed that he was being denied tenure by the President of the University of Alaska, William R. Wood, upon the recommendation of the Tenure Committee.

VI.

As the direct and proximate result of plaintiff's being denied tenure he resigned from the University of Alaska effective June 30, 1973 in an effort to reduce the professional impact of the denial of tenure. Accordingly, plaintiff stopped teaching at the University of Alaska on June 30, 1973.

ISSUES PRESENTED

(1) Was the University of Alaska required to provide Jack Van Hyning with a due process hearing concerning its refusal to grant him tenure either before or after that decision was reached.

(2) If plaintiff has stated a cause of action, is that cause of action barred by the Statute of Limitations.

(3) If plaintiff prevails on his claim on the merits, is he enti tled to damages in the nature of back wages only if he is granted tenure after a due process hearing.

DATED at Anchorage, Alaska this 19th day of October, 1977.

HAGANS, SMITH, BROWN, ERWIN & GIBBS

BY: s/_____
FLOYD V. SMITH
Counsel for Defendant

WAGSTAFF & MIDDLETON

BY: s/_____
ROBERT WAGSTAFF
Counsel for Plaintiff